



Comptroller General
of the United States

Washington, D.C. 20541

Decision

Matter of: Digital Systems Group, Inc.--Reconsideration

File: B-258262.3

Date: April 3, 1995

DECISION

Digital Systems Group, Inc. (DSG) requests reconsideration of our decision denying its protest of the terms of solicitation No. KECP-94-001, issued by the General Services Administration (GSA). Digital Sys. Group, Inc., B-258262.2, Jan. 20, 1995, 95-1 CPD ¶ 30. DSG contends that the protest should have been dismissed as academic rather than denied.

We deny the request for reconsideration.

DSG's protest challenged various terms in the solicitation, which was for GSA's Financial Management Software Systems (FMSS) multiple-award schedule. Those firms winning contracts under the solicitation will be eligible to receive delivery orders for a wide range of accounting and financial management systems software and support services purchased under the schedule. Relevant to the request for reconsideration is DSG's initial protest allegation that GSA did not properly consider whether the entire schedule, or at least part of it, should have been restricted to small businesses. We denied the protest because we concluded that the agency had reasonably determined that neither a total nor a partial small business set-aside was feasible.

Specifically, as to a total set-aside, we found reasonable GSA's conclusion that there were not two small businesses which could handle all of the government's FMSS needs. DSG essentially conceded that the agency's position in this regard was reasonable.

Concerning a partial set-aside, our Office had concern during the pendency of the protest that the parties' positions were not adequately developed. Accordingly, we asked DSG to explain the basis on which, in its view, the schedule could be divided to permit a partial set-aside. Once we received DSG's response, we permitted the agency (and the interested party) to respond to DSG's submission. In its response, GSA expanded on its earlier explanation that its inability to ascertain specific user agencies' functional needs in advance meant that GSA could not

structure a partial set-aside in such a way that it would be likely that the limited number of anticipated small business FMSS contractors could satisfy those needs. GSA also stated that severing some products or services from the balance of the schedule through a partial set-aside could lead to higher costs as well as compatibility and performance problems.

Based on this more fully developed record, our decision reached the question of whether GSA reasonably issued the solicitation on an unrestricted basis. We concluded that GSA's justification for not setting the procurement aside, either totally or partially, was reasonable. While we noted that GSA's initial consideration of a partial set-aside was incomplete, we found that, in responding to DSG's supplemental submission regarding potential ways to set aside part of the procurement, GSA had provided sufficient analysis to establish the reasonableness of its decision not to use a partial set-aside.

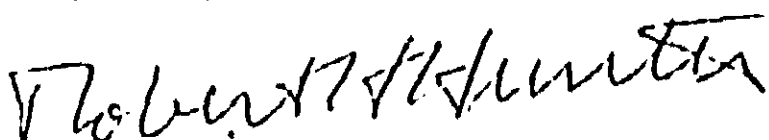
In its reconsideration request, DSG does not argue that its protest should have been sustained. Instead, it contends that our Office should have dismissed the protest as academic when the agency submitted its explanation for not using a partial set-aside. DSG asserts that its protest "did not demand that the procurement be set aside but only that GSA consider setting aside the procurement either in whole or in part." For that reason, DSG now argues that the supplemental analysis provided by GSA after the protest was filed effectively constituted corrective action, rendering the protest dismissable as academic, since it remedied the alleged absence of consideration up to that point.¹

DSG's argument fails to state a basis for reconsidering our denial of its protest. In our view, the agency's supplemental analysis simply explained more fully the initial rationale for the decision to issue the solicitation on an unrestricted basis. It was for this reason that we considered that analysis in reviewing the agency's determination not to set part of the procurement aside for small businesses. To the extent that DSG was challenging the propriety of that determination, the fact that the agency supplemented the record during the pendency of the protest did not render the protest academic.

¹DSG did not make this argument prior to issuance of our decision. Instead, it waited to offer the argument until after our Office had denied its protest on the merits.

The request for reconsideration also suggests that DSG does not contest the reasonableness of the agency's decision not to issue a partial set-aside. Once GSA more fully set forth its rationale, DSG did not file a supplemental protest challenging the determination not to use a partial set-aside. Yet, a lack of contemporaneous consideration of a partial set-aside could prejudice DSG only if DSG believed that the agency was required to set part of the procurement aside for small businesses. If DSG did not intend to argue that a set-aside was required, then the inadequate documentation alone did not prejudice DSG. Without prejudice, however, DSG lacked a valid basis of protest, since prejudice is an essential element of a viable protest. Lithos Restoration Ltd., 71 Comp. Gen. 367 (1992), 92-1 CPD ¶ 379.

In sum, if DSG did not intend its protest to assert that a partial set-aside was required, DSG lacked a valid basis of protest, and it has no ground for requesting reconsideration. Alternatively, if, as our Office understood the protest, DSG was arguing that a partial set-aside was required, our decision properly addressed the merits of the agency's determination to issue the solicitation on an unrestricted basis, and DSG's contention now that our decision should not have reached the merits is unsupported. In either case, DSG has not shown that our decision rested on an error of fact or law, and the request for reconsideration is therefore denied. See 4 C.F.R. § 21.12 (1995).


 for Robert P. Murphy
 General Counsel